Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT T. BEVILL,
Petitioner,

v.

SPRINT COMMUNICATIONS CO., L.P.,
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Robert T. Bevill
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Petitioner

June 5, 2006

QUESTIONS PRESENTED

A. Whether a corporation's sole shareholder has standing to assert fraud, as an individual, in a separate and distinct cause of action.

B. Whether *res judicata* is no longer relevant in this matter.

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INTRODUCTION

This case involves a critical distinction as to whether a corporation's sole shareholder, who was induced to form the corporation, has standing to assert fraud as an individual, and as a real party in interest, in a separate and distinct cause of action.

OPINIONS BELOW

The order and opinion of the district court granting defendant's motion to dismiss (Pet. App. 1-9) is unreported. The court of appeals' opinion (Pet. App. 10-11) is reported at 163 Fed.Appx. 6.

JURISDICTION

The court of appeals entered its judgment on January 5, 2006. A petition for rehearing and suggestion for rehearing en banc was denied on March 9, 2006. Pet. App. 14. This petition for a writ of certiorari was filed on June 5, 2006. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATEMENT

Mr. Bevill has been a respected author and guest lecturer on Internet connectivity for over ten years. In 1998, Sprint Communications Company, L.P. ("SprintCom") representatives enticed Mr. Bevill with a prospective business opportunity of providing internet connectivity to thirty-seven (37) military bases, exclusively, for an eight-year period; a contract conservatively worth $12 million.

As a condition for receiving the business opportunity, SprintCom representatives required Mr. Bevill to

incorporate a business – The Bevill Company, Inc. of New Hampshire ("BC-NH") – in order to consummate the contract. SprintCom representatives drew up a contract between BC-NH and another Sprint entity, known as Sprint/United Management Company (Sprint/UMC)[1].

The contract terms provided for a three-month test program of provisioning four military bases with dialup Internet services, followed by three consecutive monthly billing cycles of the Internet customers, before proceeding to the additional 33 military bases. By September of 2001, Mr. Bevill contends that all stated goals for the test program had been met, and formally requested Sprint to provide written acceptance, in order to continue a complete provisioning build-out of the additional 33 military bases, under the Sprint Telephone Barracks contract.

Under the "Acceptance Procedures", Mr. Bevill was to provide Internet access services to various military bases where Sprint was providing telephone services. The Agreement called for a program test period on four bases followed by an "acceptance meeting" to determine whether penetration and profitability goals had been met. If the goals were not met, a cure plan was to be implemented. If no cure plan could be agreed upon, and "after all due effort", Sprint could unilaterally terminate the program under a "termination for convenience" clause.

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[1] Since the filing of this petition, Mr. Bevill has obtained a copy of the Sprint-AAFES Barracks Contract, from Sprint, which indubitably names Sprint Communications Company, L.P. as the Sprint party-in-interest in the Barracks Contract.

At the formal acceptance meeting, Sprint attempted to introduce unattainable goals, by requiring plaintiff to include, in its dialup Internet sales projections, military personnel who did not have telephone services. Dial-up internet services cannot be provided to individuals without telephone services. Then, in October of 2001, in contravention of the acceptance procedures under the Agreement, Sprint terminated the contract under the termination for convenience clause.

Within ten days of receipt of the termination notice, BC-NH brought suit against Sprint/UMC in District Court for the District of Kansas – the "Kansas Case" – in order to seek either injunctive relief from wrongful contract termination, or quantum meruit relief for services performed to-date, if termination were granted.

During discovery in the Kansas Case, Mr. Bevill learned that SprintCom representatives negligently misrepresented its authority to offer internet services to include all thirty-seven (37) military installations covered by the concessionaire contract. In fact, Sprint's concessionaire contract only authorizes four (4) bases, for a fixed period of ninety (90) days, after which time any additional services to be provided would be evaluated. This huge disparity – four versus thirty-seven (4 v. 37) – represented an enormous financial setback for Mr. Bevill in the proposed business opportunity versus reality.

Before BC-NH was able to add Mr. Bevill as a third-party plaintiff, and formally amend the complaint to include the fraud in the inducement claim, its actions were precluded by summary judgment, April 4, 2002, before the District Court for the District of Kansas.

Subsequently, the "Kansas Case" has been reversed and remanded for further proceedings.[2]

On November 1, 2004, Plaintiff, Robert T. Bevill, filed a complaint before the District Court for the District of New Hampshire against SprintCom – the "New Hampshire Case" – whereby Mr. Bevill contended that SprintCom representatives had: (1) negligently misrepresented Sprint's authority to provide Internet services on thirty-seven (37) military installations; and (2) fraudulently concealed the contents of Sprint's concessionaire contract, whereby only four (4) of the thirty-seven (37) military installations were actually authorized to receive goods and services from BC-NH.

In the "New Hampshire Case", it is Mr. Bevill's contention that, lacking the wherewithal themselves to perform the services required to provide internet, SprintCom representatives induced him, as an individual, into sharing his work product and knowledge with Sprint, induced him to form a corporation with which to conduct business with Sprint, intentionally abrogated the agreement between the corporate parties in order to steal Mr. Bevill's work product, and continues to enjoy the benefits, to his detriment.

In this action, Mr. Bevill contends that SprintCom representatives did not have the authority to authorize BC-NH to provide dial-up internet services to all 37 bases, and issued a termination for convenience letter, in order to conceal this fact.

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[2] See *Bevill Company, Inc., v. Sprint/United Management Co.*, 154 Fed.Appx. 49 (10th Cir.(Kan.)). Pet. App. 15-21.

Mr. Bevill is a "real party in interest" under Fed.R.Civ.P. 17(a) in a diversity action for fraudulent misrepresentation by Sprint, in that as the incorporator for BC-NH, Mr. Bevill contends that SprintCom made fraudulent misrepresentations to him before the BC-NH corporation was formed and before the agreements were signed, and that the misrepresentations induced him as incorporator to form BC-NH corporation and to enter into the agreements.

In addition, on October 31, 2005, while this matter was under consideration in the First Circuit. Sprint filed a Supplemental Authority pursuant to FRAP 28j, notifying the panel of the reversal and remand in the "Kansas Case". Sprint withdrew its *res judicata* and collateral estoppel claims, in this matter. Pet. App. 12-13.

SUMMARY OF ARGUMENT

Mr. Bevill has standing in this matter, both as a party in interest, and as the sole shareholder who is "essential" to the corporation. When a corporation tortiously conspires with others to damage an individual, and does so, a cause of action arises which belongs to the individual.

Under general contract principles, it is well established that a contract is void and unenforceable if procured through fraud. When the contract is fraudulent, it is void, for fraud vitiates everything.

Also, since Sprint has withdrawn its *res judicata* and collateral estoppel claims, those arguments are no longer relevant, in this matter.

ARGUMENT

I. STANDING FOR AN INDIVIDUAL CAUSE OF ACTION CAN BE ASSERTED WHEN THE WRONG IS BOTH TO THE INDIVIDUAL AND TO THE CORPORATION.

A. Standard of Review

Article III of the Constitution confines federal courts to deciding only actual cases and controversies.[3] The burden of establishing standing rests with the party invoking federal jurisdiction.[4]

The standing inquiry has three elements. A litigant must [1] " 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and [2] that the injury 'fairly can be traced to the challenged action' and [3] 'is likely to be redressed by a favorable decision.' " [5] A plaintiff must demonstrate a concrete injury caused by the defendant and remediable by the requested relief to satisfy Article III. [6]

When a litigant has met all three requirements, it can fairly be assumed that a case or controversy has been

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[3] *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

[4] *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 14 (1st Cir. 2004).

[5] *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472, 102 S.Ct. 752, 759, 70 L.Ed.2d. 700 (1982) (footnote and citations omitted). *See Allen v. Wright*, 468 U.S. at 751, 104 S.Ct. at 3324.

[6] *American Postal Workers Union v. Frank*, 968 F.2d 1373, 1378 (1st Cir. 1992) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S.Ct. 1160, 1667).

established, and that "the particular plaintiff is entitled to an adjudication of the particular claims asserted."[7]

Mr. Bevill has established that: (1) SprintCom representatives induced him into negotiations to provide internet services for which Sprint was not authorized to perform, for which Mr. Bevill has been injured; (2) that the injury can be traced back to actions of the defendant; and (3) that redress is likely by a favorable decision.

The First Circuit panel erred when it stated that "[Mr. Bevill] has no right to litigate claims in this circuit that are integral to a suit already filed elsewhere".

The panel cited *Montana v. United States*, *Congress Credit Corp. vs. AJC Intern, Inc.*, and *Gonzalez v. Banco Cent. Corp.*, all of which recite that repetitive actions may be dismissed, when given a full and fair opportunity.

While the reversal and remand in the Kansas Case rendered the *res judicata* argument moot, the fact remains that Mr. Bevill retains the right, separately and distinctly, in his individual capacity, to bring action in this matter.

It is well established that an individual cause of action can be asserted when the wrong is both to the individual and to the corporation.[8]

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[7] *Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. at 3325.

[8] *Buschmann v. Professional Men's Ass'n.*, 405 F.2d 659, 662 (7th Cir. 1969). *See Twohy v. First National Bank of Chicago*, 759 F.2d 1185, 1194 (7th Cir. 1985); *Far West Federal Bank S.B. v. Office of Thrift Supervision-Director*, 119 F.3d 1358 (9th Cir.

It is equally clear that where a corporation tortiously conspires with others to damage an individual and does so a cause of action arises which belongs to the individual.[9] Pet. App. 22-48.

B. A shareholder who is either a real party in interest, or is "essential" to the corporation, has standing in a separate cause of action. Plaintiff qualifies under both.

It is well settled that "a shareholder does not have standing to redress an injury to the corporation in which it holds stock."[10] However, the courts have found exceptions: (1) when the sole shareholder of a corporation also qualifies as a real party in interest[11]; and (2) when the sole shareholder is "essential" to the corporation.[12] Plaintiff qualifies under both.

1997); *Moffatt Enterp. v. Borden, Inc.*, 807 F.2d 1169, 1176-77 (3rd Cir. 1986).

[9] *Moffatt Enterp. v. Borden, Inc.*, 807 F.2d 1169, 1176-77 (3rd Cir. 1987). *See Towle v. Bowing Airplane Co.*, 364 F.2d 590, 592-93 (8th Cir. 1966)(considerable uncertainty as to whom is real party in interest, the individuals or the corporation, since the Atlas corporation was not formed until after the purchase of the helicopter had been arranged.)

[10] *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439-40 (9th Cir. 1979); *Bishay v. American Isuzu Motors, Inc.*, 404 F.3d 491, 495 (1st Cir. 2005).

[11] *See K-B Trucking Co. v. Riss Intern. Corp.*, 763 F.2d 1148 (10th Cir. 1985), *Towle v. Bowing Airplane Co.*, 364 F.2d 590, 592-93 (8th Cir. 1966)

[12] *See York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir.1971), *Rea v. Ford Motor Co.*, 497 F.2d 577, 584 (3rd Cir. 1974), *John Peterson Motors, Inc. v. General Motors, Inc.*, 613 F.Supp. 887, 902.

First, Mr. Bevill is a "real party in interest" under Fed.R.Civ.P. 17(a) in a diversity action for fraudulent misrepresentation by SprintCom representatives. Mr. Bevill contends that as the incorporator for BC-NH, SprintCom made fraudulent misrepresentations to him before the BC-NH corporation was formed and before the agreements were signed, and that the misrepresentations induced him as incorporator to form BC-NH corporation and to enter into the agreements.[13]

Second, Mr. Bevill was essential to the BC-NH corporation. As was effectively argued in the Kansas case, "the parties to the contract at issue intended for the contract to be performed by a corporation controlled by Mr. Bevill. It was the man who was important to the parties, not the place of incorporation of The Bevill Company, Inc."[14]

Mr. Bevill was the sole shareholder. He performed all functions of the corporation, in support of the internet services contract, was responsible for the base installations, daily business operations, customer support, and all accounting functions of the corporation. There were no other employees of BC-NH, and no support functions were outsourced to a third-party. In essence, BC-NH was an alter ego to the individual.[15]

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[13] *K-B Trucking Co.*, 763 F.2d at 1154.

[14] Supplemental Memorandum in Support of Application for Preliminary Injunction, Doc. 32, The Bevill Company, Inc. v. Sprint/United Mngt. Co., 01-2524-CM (D. Kansas), p.5.

[15] *See John Peterson Motors, Inc. v. General Motors, Inc.*, 613 F.Supp. 887, 902 (referring to dealership as "alter-ego" of owner/operator).

Mr. Bevill qualifies under both exceptions to have standing in a separate and distinct cause of action.

C. Two relatively distinct sets of facts can be separated out as the bases for separate legal wrongs.

As was stated in *Manego v. Orleans Board of Trade,* a claim may be asserted in a separate, subsequent action only if "two relatively distinct sets of facts can be separated out as the bases for separate legal wrongs." [16]

The "Kansas Case" is between two corporate entities and seeks either injunctive relief from wrongful contract termination, or quantum meruit relief for services performed to-date, if termination were granted. The "New Hampshire Case" is a separate and distinct case made by an individual, that as the incorporator for BC-NH, Mr. Bevill contends that SprintCom representatives made fraudulent misrepresentations to him before the BC-NH corporation was formed.

Promissory fraud is generally not actionable, but there is an exception to this rule "where the false promise or representation of intention of future conduct is the scheme or device to accomplish the fraud."[17] The scheme exception applies where "a party makes a promise of performance, not intending to keep the promise but intending for another party to rely on it,

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[16] *Manego v. Orleans Board of Trade*, 773 F.2d 1, 7 (1st Cir. 1985).

[17] *Bower v. Jones*, 978 F.2d 1004, 1011 n. 12 (7th Cir. 1992).

and where the other party relies on it to his detriment."[18]

Sprint's scheme was to fraudulently conceal the terms of its concessionaire contract, and its limitation, of internet services to a four-base, 90-day trial test period. SprintCom representatives, lacking the wherewithal themselves to perform the services, induced Mr. Bevill into sharing his work product and knowledge with Sprint, induced him to form a corporation with which to conduct the *fiction* of a contract with Sprint, abrogated that agreement between the corporate parties, and continues to enjoy the benefits, to his detriment.

Because of the precipitous actions by SprintCom representatives, Mr. Bevill personally borrowed money from investors, invested personal funds, personally guaranteed loan payments on computer networking equipment and telephone lease lines, before incorporating BC-NH, to his detriment.

The First Circuit panel erred when it ignored the Appellant's argument that the fact remains that two distinct set of facts can be separated out as the bases for separate legal wrongs. The principles of contract law permit rescission of a contract even when the misrepresentations at issue were made by a non-party to the contract.[19] If a party's manifestation of assent is induced by a fraudulent or a material misrepresentation by the other party upon which the

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[18] *Bower at* 1011.

[19] *Kenda Corp., Inc. v. Pot O'Gold Money Leagues, Inc.*, 329 F.3d 216, 224 n.2 (1st Cir. 2003).

recipient is justified in relying, the contract is voidable by the recipient.[20]

Under general contract principles, it is well established that a contract is void and unenforceable if procured through fraud.[21] When the contract is fraudulent, it is void, for fraud vitiates everything. [22]

Under Kansas law, "when alleged fraud relates to promises or statements concerning future events, the gravamen of such a claim is not the breach of the agreement to perform, but the fraudulent misrepresentation concerning a present, existing intention to perform when such intention is in fact nonexistent."[23]

Statements or promises about future occurrences in connection with contract are not actionable as fraudulent misrepresentation unless, at time promise as to future events was made, promisor did not intend to perform promised action.[24]

Sprint was never authorized to offer Mr. Bevill a contract to provide internet services to all 37 military bases, as is stated in the contract. Sprint never intended to continue the *fiction* of a contract, because it would have been required to request an additional amendment to its contract beyond the previous four-base, 90-day trial test period amendment, and never

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[20] Restatement (Second) Contracts §164(1) (1981).
[21] *Griego v. Padillo*, 64 F.3d 580 (10th Cir. 1995).
[22] 1 Fonbl. Equity, 66.
[23] *K-B Trucking Co. v. Riss Intern. Corp.*, 763 F.2d 1148, 1156 (10th Cir. 1985) (*quoting Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70, 596 P.2d 816, 824 (1979)).
[24] *Flight Concepts Ltd. Partnership v. Boeing Co.*, 38 F.3d 1152 (10th Cir. 1994).

communicated to Mr. Bevill the disparity between four and thirty-seven bases in Sprint's contract.

D. This action matches the four corners of the *K-B Trucking Co.* case, in that the incorporator alleged that fraudulent misrepresentations were made to him before corporation was formed.

In the case of *K-B Trucking Co. v. Riss Intern. Corp.*, the Tenth Circuit determined that Keith Collins is a real party in interest under Rule 17(a). This action on appeal matches the four corners of the *K-B Trucking Co.* case, in that the incorporator alleged that fraudulent misrepresentations were made to him before K-B was formed. The Tenth Circuit stated that "[w]e believe that under Kansas law, Collins was a person whom defendants intend[ed] or ha[d] reason to expect to act or refrain from an action in reliance upon the misrepresentation or concealment."[25]

For the conclusions reached by the Tenth Circuit in *K-B Trucking*, the First Circuit erred in not finding that Mr. Bevill has standing as a party in interest, in this matter.

II. RES JUDICATA IS NO LONGER RELEVANT IN THIS MATTER.

A. Standard of Review

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[25] *K-B Trucking Co.*, 763 F.2d at 1154.

A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.[26]

Both the First and Tenth Circuits follow the transactional approach to claim preclusion set out in Restatement (Second) of Judgments §24 (1982).[27]

Claim preclusion is appropriate unless the party seeking to avoid preclusion did not have a "full and fair opportunity" to litigate the claim in the prior suit.[28] Under federal law, res judicata can sometimes operate to bar maintenance of action by persons who technically were not parties to initial action to which preclusive effect is attributed.[29]

B. Sprint has withdrawn the argument subsequent to the Tenth Circuit decision.

On October 31, 2005, while this matter was under consideration in the First Circuit, Sprint filed a Supplemental Authority pursuant to FRAP 28j, notifying the panel of the reversal and remand in the "Kansas Case". Sprint withdrew its *res judicata* and collateral estoppel claims, in this matter. The "Kansas Case" has been remanded for conclusive determination of Sprint's obligation of "all due effort", under the Acceptance Procedures of the

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[26] *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

[27] *See MACTEC Inc., v. Gorelick*, 427 F.3d 821, 832 n. 12 (10th Cir. 2005); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994), *Manego v. Orleans Board of Trade*, 773 F.2d 1 (1st Cir. 1985).

[28] *Mactec*, 427 F.3d at 831; *Gonzalez*, 27 F.3d at 758.

[29] *Gonzalez*, 27 F.3d at 756.

contract, before invoking the Termination for Convenience provision, and for further proceedings. The window of opportunity to adjoin additional parties and to amend the complaint has closed in the Kansas Case.

The First Circuit panel erred when it ignored the Supplemental Authority, filed by Sprint, whereby Sprint withdrew its *res judicata* argument, rendering the argument moot.

C. BC-NH Corporation did not have full and fair opportunity to litigate its claim in the prior suit.

BC-NH has argued in its Reply Brief before the Tenth Circuit that *res judicata* does not apply if the party against whom an earlier decision is asserted did not have a "full and fair opportunity" to litigate a claim or issue.[30] Sprint is fully aware that BC-NH was precluded by summary judgment from pursuing its fraud and unconscionability arguments in the prior suit.

The "Kansas Case" has been remanded for conclusive determination of Sprint's obligation of "all due effort" under the terms of the contract.

D. Plaintiff in this matter was not a party to the initial action.

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[30] *See Griego v. Padillo*, 64 F.3d 580, 583 (10th Cir. 1995) (citing *Kremer v. Chemical Constr. Corp.*, 623 F.2d 786; 456 U.S. 461, 480-81 & 481 n.22).

Under federal law, res judicata can sometimes operate to bar maintenance of action by persons who technically were not parties to initial action to which preclusive effect is attributed.[31] Mr. Bevill was not a party in the initial action, in his individual capacity, and has been precluded from impleading himself, or amending the original complaint to include fraud in the inducement in the initial action, by the summary judgment decision of 04/04/2000, before the District Court for the District of Kansas.

CONCLUSION

First, Mr. Bevill has standing in this matter, because according to *K-B Trucking Co.*, Mr. Bevill is a "real party in interest" under Fed.R.Civ.P. 17(a). This action on appeal matches the four corners of the *K-B Trucking Co.* case, in that both incorporators alleged that fraudulent misrepresentations were made to them before the corporations were formed.

In the alternative, Mr. Bevill is essential to the corporation. It was the man who is important to fulfilling the obligations under the contract; not the corporation that he was induced to form. There were no other employees of BC-NH, and no support functions were outsourced to a third-party. In essence, BC-NH was an alter ego to the individual.

Pleader of misrepresentation claim usually is expected to specify the who, what, where, and when of the allegedly false of fraudulent representation. [32]

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[31] *Gonzalez*, 27 F.3d at 756.

[32] *Alternative System Concepts, Inc. v. Synopsys, Inc* , 374 F.3d 23, 29 (1st Cir. 2004).

Mr. Bevill has properly named the defendant in this matter. SprintCom representatives, lacking the wherewithal themselves to perform the services required to provide internet, induced Mr. Bevill, as an individual, into sharing his work product and knowledge with Sprint, induced him to form a corporation with which to conduct business with Sprint; and intentionally abrogated the agreement between the corporate parties in order to steal Mr. Bevill's work product.

Second, a claim may be asserted in a separate, subsequent action only if two relatively distinct sets of facts can be separated out as the bases for separate legal wrongs. The "Kansas Case" is between two corporate entities and seeks either injunctive relief from wrongful contract termination, or quantum meruit relief for services performed to-date, if termination were granted. The "New Hampshire Case" is a separate and distinct case made by an individual, that as the incorporator for BC-NH, Mr. Bevill contends that SprintCom representatives made fraudulent misrepresentations to him before the BC-NH corporation was formed.

It is well established that an individual cause of action can be asserted when the wrong is both to the individual and to the corporation.

It is equally clear that where a corporation, tortiously conspires with others to damage an individual and does so a cause of action arises which belongs to the individual.

The principles of contract law permit rescission of a contract even when the misrepresentations at issue were made by a non-party to the contract.

Under general contract principles, it is well established that a contract is void and unenforceable if procured through fraud.[33] When the contract is fraudulent, it is void, for fraud vitiates everything.[34]

Finally, Sprint has withdrawn its *res judicata* and collateral estoppel claims, in this matter, rendering the argument moot. In the alternative, Mr. Bevill was barred from impleading himself, and amending the complaint to include fraud in the inducement, in the "Kansas Case"; his actions were precluded by summary judgment before the District Court for the District of Kansas. And, both Mr. Bevill and BC-NH have not been given a full and fair opportunity to litigate their claims in the prior suit.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully Submitted,

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June 5, 2006

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[33] *Griego v. Padillo*, 64 F.3d 580 (10th Cir. 1995).
[34] 1 Fonbl. Equity, 66.